

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL No. 293/2021

BETWEEN:

BONANZA CASH EXPRESS LIMITED



AND

**MAPEPI BIBLE COLLEGE REGISTERED
TRUSTEES**

RESPONDENT

CORAM: SICHINGA, NGULUBE AND BANDA-BOBO, JJA.
On 24th March, 2022 and 14th October, 2022.

For the Appellant: Ms. N. Adam, Mesrres D. Findlay and Associates

For the Respondent: Mr. A. Malao, Mr. G. Haakainsi, Messrs L.M. Chambers

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Abram vs North Eastern Railway Co. Court of Appeal England 1883,*
2. *Nkhata and Four others vs Attorney General (1966) ZR 124.*
3. *Nkongolo Farms Vs Zambia National Commercial Bank, SCZ Appeal Number 101/2004*
4. *Wilson Masauso Zulu Vs Avondale Housing Project Limited (1982) ZR 172*
5. *Khalid Mohamed vs Attorney –General (1982) Z.R. 49*
6. *Cavmont Capital Holdings Plc vs Lewis Nathan Advocates, SCZ Judgment Number 6 of 2016*

7. *Printing and Numerical Registering Company vs Simpson (1875) Z.R 19*
8. *Ex-parte Lanstone (1810) 17 vs 227 at 230*
9. *Molton Finance Limited (1967) 3 ALL ER 843 at 845*
10. *Access Bank Zambia Limited vs Group Five Zcon Business Park Joint Venture, SCZ/08/52/2014*
11. *Sithole vs Zambia State Lotteries Board (1975) ZR106*
12. *Mulenga vs Serioes and Others, SCZ/8/47/2009*
13. *Intermarket Banking Cooperation Limited vs Kasonde, SCZ Judgment Number 44 of 2014*

Legislation referred to:

1. *The Court of Appeal Rules, Statutory Instrument Number 65 of 2016*
2. *The Money Lenders Act, Chapter 398 of the Laws of Zambia*

Other work referred to:

1. *The Halsbury's Laws of England, 4th Edition, Butterworths, 1992*

INTRODUCTION

1. This is an appeal by the appellant against the Judgment of Honourable Mr. Justice K. Chenda, delivered on 13th September, 2021, in favour of the respondent. The appellant was the plaintiff and the respondent was the defendant in the lower court.

BACKGROUND

2. The background to this matter is that, the appellant, who was the Applicant in the court below, commenced the matter by way of originating summons, accompanied by an affidavit in support on

22nd July, 2020. The originating summons were amended with leave of court and filed into the High Court on 4th September, 2020.

The appellant sought the following reliefs in the lower court-

- a) The immediate settlement of the sum of Zambia Kwacha One Million Three Hundred and Thirty Two Thousand Kwacha (ZMW1,332,000.00) being the principal sum borrowed by the respondent from the applicant with interest thereon up to the date of Originating Summons, which is due and payable to the Applicant under a loan agreement entered into between the applicant and the respondent;
- b) Interest on the amount due from date of Originating Summons to date of payment thereof;
- c) An order of foreclosure and/or sale of Subdivision A of Subdivision 4 of Subdivision D of Farm No. 411a Lusaka in the Lusaka Province of the Republic of Zambia, as well as Subdivision D of Subdivision 4 of Subdivision D of Farm No. 411a, Lusaka in the Lusaka Province of the Republic of Zambia and Subdivision D of Subdivision 4 of Subdivision D of Farm No. 411a, Lusaka in the Lusaka Province of the Republic of Zambia, offered as security for the repayment of a loan agreement dated 7th March, 2019.

- d) An order for the delivery and possession of the properties being, Subdivision A of Subdivision 4 of Subdivision D of Farm No. 411a Lusaka in the Lusaka Province of the Republic of Zambia and Subdivision D of Subdivision 4 of Subdivision D of Farm No. 411a, Lusaka offered as security for the repayment of loan agreement dated 7th March, 2019.
 - e) An order that the respondent do execute under seal, a Deed of Assignment to convey the mortgaged properties into the Applicant's name.
 - f) They also sought further relief that the court may deem fit, and
 - g) Costs of and incidental to the action.
3. On 18th September, 2020, the lower court rendered an order in chambers that the matter be deemed to have been commenced by writ of summons and statement of claim. On 22nd September, 2020, the appellant accordingly filed the writ of summons and statement of claim. The parties exchanged pleadings with the respondent being the Defendant and the appellant being the Plaintiff.

CASE BEFORE THE LOWER COURT

4. By statement of claim filed on 22nd September, 2020, the appellant sought-
- i) Payment of the sum of ZMW1,332,000.00 allegedly owed by the respondent under a loan agreement between the parties dated 7th March, 2019.
 - ii) Interest
 - iii) In the alternative, an order for possession and foreclosure of Subdivision A of Subdivision 4 of Subdivision D of Farms Number 411a, Lusaka and Subdivision D of Subdivision 4 Subdivision D of Farm Number 411a Lusaka, offered as security within the said loan agreement.
 - iv) An order that the respondent do execute a deed of assignment to convey the said properties into the appellant's name.
 - v) Further or other relief that the court may deem fit, and
 - vi) Costs.
5. In its amended defence, the respondent denied the appellant's claims and filed a counterclaim for-
- i) a declaration that the intended contract of sale of Subdivision 'A' of Subdivision 'D' of Farm No. 411a on title number 24667,

between the Plaintiff and the Defendant is invalid for consideration.

- ii) A declaration that the plaintiff is not entitled to payment of ZMW1,332,000.00 and enforcement of the loan agreement as the same was never disbursed.
 - iii) Removal of the mortgage registered by the Plaintiff on the property in issue.
 - iv) Any other relief the court may deem fit
 - v) Costs.
6. The Plaintiff filed a reply and a defence to counterclaim on 8th December, 2020. The lower court found the following facts as common cause-
- i) That the plaintiff and defendant entered into a loan agreement dated 7th March, 2019.
 - ii) The defendant pledged F411a/D/4/D as security to the plaintiff.
 - iii) The defendant gave the plaintiff the certificates of title for both F411a/D/4/A and F411a/D/4/D
 - iv) The defendant has not paid any money to the plaintiff pursuant to the loan agreement.

- v) The Plaintiff has not paid the defendant any money pursuant to the contract of sale for subdivision A.
 - vi) The Plaintiff has a mortgage registered on both properties.
7. The matter proceeded to trial and the first witness, PW1 was Zhuang Bow Fu, the general manager of the plaintiff company. He filed a witness statement dated 30th March, 2021. His testimony was that the loan agreement was only in relation to Subdivision D and that Subdivision A was not part of the loan agreement. PW1 further testified that there was no loan facility letter but maintained that there was a document that showed that the defendant acknowledged receipt of the disbursed amount.
8. The witness stated that he did not know that payments that involve large amount of money as the transaction between the plaintiff and the defendant should be disbursed through the bank. PW1 stated that there were witnesses who were present when the plaintiff handed over the money to the defendant. According to PW1, the plaintiff had a Money Lenders' Licence that gave it authority to lend out money and he stated that he was aware that the said **Money Lenders Act** allowed the charging of interest on money lent out at 48% per annum.

9. PW1 stated that the loan that the defendant obtained was to be paid back within six months, at the interest of 48% for the six months that the loan was outstanding. The witness stated that he did not execute the two mortgage deeds relating to the loan agreement between the parties, but they executed the mortgage deed. The witness went on to state that the plaintiff did not pay the purchase price for the defendant's property, Subdivision A of Subdivision 4 of Subdivision D of Farm 411a, Lusaka.
10. PW2, Chilonje Phiri a loans consultant in the employ of the plaintiff gave evidence to the effect that the loan agreement and the contract of sale related to the same properties. PW2 denied preparing a mortgage deed for the transactions between the plaintiff and the defendant. He maintained that the defendant's representative collected the loan amount after signing a document acknowledging receipt. PW2 stated that he did not witness the payment of the purchase price by the plaintiff to the defendant. PW2 maintained that the transaction that the parties entered into related to a loan and was not a contract of sale.
11. PW3, Lee Hanzila was a Risk and Compliance Officer in the employ of the plaintiff. He referred to a document which he described as the Board Resolution for the disbursement of a loan amounting to

K1,450,000.00 from the appellant to the respondent. He agreed that Subdivision A was not part of the properties indicated in the Board Resolution as security for the loan that the defendant obtained from the plaintiff. According to PW3, the plaintiff did not pay for the properties as agreed in the contract of sale. The witness stated that there were no mortgage documents relating to the parties in the plaintiff's bundle of documents.

12. PW3 stated that he did not know how much money was given to the defendant. He admitted that the name of the defendant did not appear in the acknowledgment of receipt document.
13. The first witness for the defendant, DW1 was Hubrey Milton Msalu, the Board Chairman of the Defendant. Mr. Msalu confirmed that a valuation report dated 18th September, 2020 was in the plaintiff's comprehensive bundle of documents relating to property number F/411a/D/4/D, which was also referred to as subdivision D. The report stated that the market value of the property was ZMW300,000.00 and was much lower than the ZMW900,000.00 on the loan agreement.
14. DW1 went on to state that the Board resolution dated 22nd February, 2019 referred to one property as collateral for the loan agreement. According to the witness, Subdivision A was a

transaction for sale, with the contract of sale dated 7th March, 2019 which he signed on behalf of the respondent. He referred to Clause 14 of the Contract of Sale which stated that the Vendor (Respondent) had a buy back option by monthly installments. He maintained that the respondent did not make any payment to the appellant.

15. DW1 stated that after he was given the money at the appellant's offices, he was asked to leave it in a certain room and was told that he would collect it at a later stage. He made follow-ups at the appellant's offices later but was not given the money. He concluded that he had been swindled but did not report the matter to the police.
16. The respondent demanded for the release of the title deeds from the appellant on 9th December, 2019, the appellant placed caveats on the property on 13th March, 2019. It did not release the title deeds to the respondent.
17. DW2, Charles Kambuyu, the Board Secretary of the respondent gave evidence to the effect that the loan agreement between the appellant and the respondent was signed on 7th March, 2019, before money was disbursed. The purpose of the loan application was to develop the Bible College situated on farm 411A, Chilanga.

18. The lower court considered the evidence before it as well as the submission that were made by counsel. The court came to the conclusion that there was no evidence that the appellant made the disbursement to the respondent. The court found that the appellant had failed to prove that it disbursed the loan sum of K900,000.00 to the respondent.
19. The court found that the appellant and respondent were bound by the contract of sale which evidenced that Subdivision A was pledged by the respondent as security under the loan agreement and was not the subject of an unfulfilled contract of sale. The court stated that the parties created an equitable mortgage to secure any advances under the loan agreement.
20. The court concluded that since the appellant failed to prove that it made any disbursement to the respondent under the loan agreement, it was not entitled to payment of the sum of K1,332,000.00. The court found that the contract of sale for subdivision A was a valid form of security.
21. According to the court, since there was no evidence of disbursement by the appellant to the respondent, there was no basis for maintaining the entries in the lands register. The appellant was accordingly ordered to surrender the Certificates of

Title for Subdivision A and D to the respondent and the Registrar was ordered to vacate the entries on the Lands and Deeds register which showed registration of mortgages in favour of the appellant.

GROUND OF APPEAL

22. Dissatisfied with the Judgment, the appellant has appealed to the court advancing three grounds of appeal couched as follows-

1. ***The Court below erred in law and fact when it failed to properly apply the law which requires that fraud must be specifically pleaded and proved to a higher standard than on a balance of probabilities and that the burden of proving this was on the Defendant who alleged that the loan amount was not disbursed despite the Defendant's execution of the Acknowledgement of Receipt; Repayment Schedule and Contracts of Sale specifying receipt of the loan amount and notwithstanding that the Defendant deposited original Certificates of Title with the plaintiff, creating an equitable mortgage. In any event the court below erred in shifting the burden of proof on the Plaintiff to disprove that the loan amount was not received by the Defendant when in fact it was the Defendant that alleged that the loan amount was not disbursed despite having surrendered the Certificates of Title thereby creating an equitable mortgage; having signed the Acknowledgment of Receipt, Repayment Schedule and having executed the Contract of Sale acknowledging receipt of the loan amount.***
2. ***The court below erred and misdirected itself in not properly evaluating the evidence on record in an unbiased and balanced manner, by only considering the flaws of one side and not the other; by failing to take into consideration the documentary***

evidence on record and instead preferring parole testimony of witnesses contradicting or varying the written text, thereby arriving at a conclusion that the loan amount was not disbursed to the Defendant, which conclusion and finding is unsupported by a proper view of the evidence on record particularly:-

- a. By selectively only taking into account the testimony of PW1; PW2 and PW3 and excluding the testimony of DW1 and DW2 in determining whether money was disbursed to the Defendant;*
 - b. By selectively excluding the evidence of PW3 in determining that the Acknowledgement of Receipt and Repayment Schedule was signed by DW1 before disbursement of funds and thereby concluding that the money was not disbursed to the Defendant;*
 - c. In failing to take into consideration the fact that the Defendant only raised the issue of non-disbursement of funds and demand for the return of its deeds after the default period had elapsed, some eight months after executing the Loan Agreement which fact was confirmed by both DW1 and DW2.*
- 3. The court blow misdirected itself in that despite finding that the deposit of original Certificate of Titles for Subdivision 'D' of Subdivision '4' of Subdivision 'D' of Farm 411a, Lusaka and Subdivision 'A' of Subdivision '4' of Subdivision 'D' of Farm 411a, Lusaka by the Defendant with the Plaintiff created an equitable mortgage over the properties but failed to take into consideration that such deposit of titles which created the equitable mortgage as found by the court raised a presumption at law that there was consideration, rebuttal of which was with the defendant ad not the Plaintiff.*

ARGUMENTS IN SUPPORT OF THE APPEAL

23. Counsel for the appellant filed into court heads of argument in support of the appeal upon which he relied and augmented the same with oral submissions. The gist of the arguments put forward for ground one was that the appellant disbursed the sum of ZMW900,000.00 to the respondent in line with the documentary evidence on record as well as the surrender of the original Certificates of Title and various deeds that were executed. It was contended that the lower court placed the burden of proving whether the sum in issue was disbursed to the respondent upon the appellant as the court stated that the appellant failed to prove that it disbursed the loan sum of ZMW900,000.00 to the respondent. It was argued that it was upon the respondent to prove that DW1 handed back the money to some people at the appellant's premises.
24. The court's attention was drawn to the case of ***Abram vs North Eastern Railway Co¹***, on the principle that the question of burden of proof shifts upon evidence being presented which rebuts the evidence against which there is a contention by a party. It was contended that the burden of proof shifted upon the respondent to adduce evidence to rebut that the respondent's board chair handed

back the disbursement to the appellant and did not receive the loan amount.

25. It was argued that the respondent pleaded misrepresentation and that it was defrauded as the money it received was handed back to the appellant. According to Counsel, this was a serious allegation that required cogent evidence and the burden of proof should have been discharged by the respondent.
26. It was contended that sufficient documentary evidence had been tendered by the appellant to show that it disbursed the money to the respondent as the original certificates of title were given to the appellant. Counsel argued that the respondent did not report any matter to the police regarding the alleged fraud.
27. This court was urged to reverse the lower court's findings of fact that the appellant had not adduced evidence to prove disbursement. We were urged to allow the first ground of appeal for the aforestated reasons.
28. In arguing ground two, it was submitted that the evidence on record proved that the loan was disbursed to the respondent, which evidence the lower court failed to properly evaluate and consider. It was submitted that the evidence on record showed that PW1 and PW3 physically witnessed DW1 leaving the appellant's premises

with a black bag in hand. The appellant's counsel contended that the lower court's conclusion that the appellant did not disburse any money to the respondent was not supported by the evidence on record as the money was disbursed to DW1 in the presence of DW2 at the appellant's premises.

29. According to Counsel, the lower court misdirected itself when it concluded that the acknowledgment of receipt was signed before the disbursement. We were urged to reverse this finding of fact by the lower court in accordance with the case of ***Nkhata and Four others vs Attorney General***². Reference was also made to the case of ***Nkongolo Farms Vs Zambia National Commercial Bank***³, and ***Wilson Masauso Zulu Vs Avondale Housing Project Limited***⁴ and this Court was urged to reverse the lower court's decision for failing to assess and evaluate the evidence adequately.
30. According to Counsel, the lower court failed to consider the weakness in the respondent's evidence that he raised the issue of the money not having been disbursed by the appellant eight months later, after executing the loan and after having defaulted in paying the money back. We were urged to reverse the findings of the lower court by making the relevant inferences from the evidence on record.

31. Reference was made to the case of *Khalid Mohamed vs Attorney – General*⁵ in this regard, as it is highly improbable that the respondent's version of events was true based on the overwhelming evidence on record that the loan sum was in fact disbursed.
32. It was argued that the lower court failed to evaluate the evidence of the respondent on the counterclaim and it was prayed that this court reverses the lower court's findings of fact and find that the appellant disbursed ZMW900,000.00 to the respondent.
33. Turning to ground three, it was argued that the surrendering of the original Certificates of Title for both properties to the appellant created a presumption at law that the respondent owed the appellant. It was further argued that by surrendering the original Certificates of Title to the appellant, the respondent undertook to be liable for the debt and to do all that was required to effect the vesting in the mortgage.
34. It was contended that the deposit of the original Certificates of Title created a presumption of an equitable mortgage and that there was a liability owing which created a charge over the properties. According to Counsel, the respondent was obliged to rebut the presumption with clear evidence. It was contended that the respondent did not adduce clear and sufficient evidence to rebut

the presumption that an equitable mortgage was created. The court's attention was drawn to the cases of **Cavmont Capital Holdings Plc vs Lewis Nathan Advocates**⁶, and **Printing and Numerical Registering Company vs Simpson**⁷. Reference was made to the case of **Ex-parte Lanstone**⁸ where the court held that —

"It has been long established that a mere deposit of title deeds upon an advance of money, without a word passing, gives an equitable lien, and as the court would infer from the deposit that money, then advanced should be charged as if there was a written agreement."

35. Reference was further made to **Halsbury's Laws of England, 4th Edition, volume 17, paragraph 16** which states that—

"Where there is a rebuttable presumption of law in favour of one party, the burden of rebutting it lies upon the other. Therefore, a party suing on a bill of exchange need not initially give any evidence of consideration, or that he is a holder in due course, since there are presumptions to this effect in his favour."

36. The court's attention was drawn to the case of the **Molton Finance Limited**⁹ where the court held that-

"Where an equitable mortgage or charge is created by deposit of title deeds, there is an implied contract that the mortgage or charge may retain the deeds until he is paid. This implied contract is part and parcel of the equitable mortgage or charge. It is not a separate legal

or common law lien. It has no independent existence apart from the equitable mortgage or charge.”

37. It was argued that the burden rested on the respondent and that it should have been made to rebut the presumption raised by the surrender of the original Certificate of Title. The appellant prayed that the appeal be allowed and that the lower court's decision be reversed with the respondent being made liable to repay the appellant for the properties that were pledged as security, with costs to the appellant.

RESPONDENT'S CONTENTIONS

38. The respondents filed heads of argument in response on 10th March, 2022. The respondent's Advocates began by raising an objection that the appellant's grounds of appeal presented in the memorandum of appeal are not concise and contain arguments and narratives, thus offending the Rules of the Court. Reference was made to ***Order X Rule 9(2) of the Court of Appeal Rules, 2016*** which provides that-

“(2) A Memorandum of Appeal shall set forth concisely and under distinct heads without argument or narrative the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.”

39. It was argued that it is mandatory for the appellant to prepare and present the grounds of appeal in accordance with the rules of this Court. According to Counsel, the memorandum of appeal filed by the appellant reveals that the grounds of appeal are not concise and they contain arguments and narratives, thus offending the rules of this Court. We were urged to dismiss the appeal for the aforestated reasons.

40. Our attention was drawn to the case of **Access Bank Zambia Limited vs Group Five Zcon Business Park Joint Venture**¹⁰ in which Malila, JS (as he then was) in delivering the Judgment of the Court stated that-

“In NFC Mining Plc vs Techpro Zambia Limited, we warned that failure to comply with rules by litigants could be fatal to their case. We dismissed that appeal in that case on account of the appellant’s failure to comply with the rules. We stated among other things that-

“Rules of the court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed.”

41. It was submitted that the appellant had breached a mandatory rule and that as such, this appeal is incompetently before this court and ought to be dismissed. In the alternative, the respondent filed heads of argument responding to the appellant’s heads of argument.

42. Responding to ground one, it was submitted that the appellant's arguments in ground one of the appeal is that the intended loan amount of ZMW900,000.00, was not disbursed to the respondent by the appellant. It was argued that the respondent pleaded misrepresentation in its pleading and also led evidence to prove it in cross-examination, of the appellant, and in the respondent's evidence in chief, it was shown that the appellant did not disburse the loan amount to the respondent. It was argued that evidence was led to show that the loan was not disbursed to the respondent and that the lower court held accordingly after analyzing the evidence before it.
43. Counsel contended that the findings of fact that were made by the lower court were supported by the evidence on record and that the Judge had the opportunity to observe the demeanor of the witness who testified in court. It was submitted that out of all the appellant's witnesses in the lower court, only PW3 was credible and testified that he saw PW2 hand over money to the respondent's witness, DW1. The witness further stated that all documents relating to the transaction were signed prior to the disbursement of the loan.

44. Counsel contended that the lower court's findings of fact were supported by the evidence on record and that this Court as an appellate court cannot interfere with the same. Reference was made to the case of ***Zulu vs Avondale Housing Project Limited (supra)*** in this regard.
45. According to Counsel, since the respondent denied receiving the loan amount, it was the duty of the appellant to adduce evidence to prove the disbursement of the loan amount. The Court was urged to dismiss ground one for lack of merit.
46. The second ground of appeal attacked the lower court's evaluation of the evidence on record, stating that it was unbalanced and that it did not consider the documentary evidence on record. Responding to this ground, it was submitted on behalf of the respondent that the lower court evaluated the evidence before it in a balanced way as the court referred to the evidence of the witnesses. The court then made a decision to accept the evidence of some witness based on credibility. It was contended that the lower court rendered a reasoned judgment and that there is no merit in the argument that the lower court's evidence was unbalanced.
47. Regarding the signed acknowledgement of receipt and the disbursement of the funds, it was argued that a receipt is not

conclusive evidence of disbursement of money. The Court's attention was drawn to the learned authors of *Halsbury's Laws of England, 5th Edition, Volume 12, London Sweet and Maxwell, Paragraph 1010*, which states that-

“Receipts are in general only prima facie evidence of payment and can be contradicted by proof that the money was not in fact paid, that the transaction was fraudulent, that the terms of the receipt do not accurately state the transaction. . .”

48. The respondent submitted that evidence was adduced by the respondent during trial to show that although the acknowledgement of receipt was signed, the loan amount was not disbursed by the appellant. It was contended that the lower court was on firm ground when he found that the loan amount was not disbursed as there was no proof of the same after all the documents relating to it were signed. We were urged to dismiss this ground of appeal.
49. Responding to ground three, it was submitted that an equitable mortgage cannot be created unless consideration is made as mere surrender of a Certificate of Title does not create an equitable mortgage. According to Counsel, the record shows that the appellant had registered mortgages at the Lands and Deeds Registry which were ordered to be cancelled by the lower court. It

was contended that an equitable mortgage cannot be registered and that only a legal mortgage can be registered. The court was urged to dismiss all the grounds of appeal for lack of merit, with costs to the respondent.

50. The appellant's heads of argument in reply, in relation to ground one are that the lower court shifted the burden of proof upon the appellant when it was the respondent who alleged that the loan sum was not disbursed to it and also pleaded misrepresentation. The court's attention was drawn to the cases of ***Sithole vs Zambia State Lotteries Board***¹¹, ***Mulenga vs Serious and Others***¹², ***Intermarket Banking Cooperation Limited vs Kasonde***¹³, highlighting the issue that where a party alleges misrepresentation or fraud, it ought to be pleaded and proved with a higher degree of proof.
51. According to the appellant, the burden of proof shifted upon the respondent to rebut the evidence that the loan amount was handed over to DW1 and that it was the respondent who had the burden of proving that DW1 handed the money back to the appellant, proving that the respondent did not receive the loan amount. The appellant maintained that money was handed to DW1 who must prove the misrepresentation that DW1 gave the cash back to the appellant.

The appellant contended that the respondent's assertion of misrepresentation ought to have been proved with the requisite standard of proof, warranting interference with the lower court's finding of fact.

52. It was contended that the lower court failed to consider the evidence and admission by DW1 and DW2 in cross-examination that the sum of K900,000.00 was disbursed by PW1 and DW1 in the presence of DW2. The appellant repeated its earlier contention that the lower court failed to consider the evidence of DW1 and DW2 in its evaluation of evidence, as if it had, it would have concluded that the money was disbursed to DW1.
53. It was further submitted that the issue of non-disbursement was raised by the respondent after it defaulted on the loan agreement, eight months after entering into the agreement. The Court was urged to find, based on the evidence on record, that the loan was disbursed to the respondent. We were urged to reverse the lower court's decision for the aforesaid reasons.
54. The appellant urged the Court to disregard DW1's assertion that he gave the loan money back to the appellant in another room as the documents on record indicate receipt of the loan amount. The Court was urged to allow the appeal and reverse the lower court's

judgment, making the respondent liable to pay the appellant for the liability secured by the properties that were pledged as security.

OUR ANALYSIS AND DECISION

55. We have considered the arguments and the judgment being impugned. The first ground attacks the learned Judge for failing to properly apply the law which requires that fraud is specifically pleaded to a higher standard of proof and that the lower court should have made the respondent prove that the loan amount was not disbursed to him despite surrendering the certificates of title to the appellant.
56. The respondent on the other hand contended that it pleaded misrepresentation in its pleadings and also led evidence to prove it. We have considered the evidence on record regarding ground one. We take the view that the lower court properly analysed the evidence before it and found that the money was not disbursed to the respondent's representative, DW1.
57. The court stated that it observed the demeanor of PW2 who stated that he was the one who gave the money in issue to DW1. The court stated that when PW2 was cross-examined on whether or not the money was given to the respondent, he answered nervously after hesitating and looking at the ceiling, and then stated that the

suggesting by the respondent's Counsel to the effect that the money was not disbursed, was untrue. The court stated that it found PW2 was not a credible witness.

58. The evidence of PW3 was that all the transaction documents were signed before the disbursement and as such it could not prove that the disbursement was made. Based on the analysis of the evidence highlighted above, the lower court found that on a balance of probabilities the appellant failed to prove that it disbursed the loan of K900,000.00 to the respondent. We are satisfied that the lower court properly analysed the evidence before it and was on firm ground when it concluded that the loan amount of K900,000.00 was not disbursed to the respondent's representative. We do not find merit in the first ground of appeal for the aforesaid reasons and it is accordingly dismissed.
59. The second ground of appeal questions the lower court's analysis of the evidence before it, stating that the court failed to evaluate the evidence in a balanced and objective manner and that it failed to consider the documentary evidence before it and proffered the testimony of the respondent witness which contradicted the written text and arrived at the conclusion that the loan amount was not disbursed. We have considered the record of appeal and the

evidence that was analysed by the lower court in relation to this ground of appeal. We note that the lower court took time to analyse the evidence before it which was proffered by witnesses of the appellant and those of the respondent.

60. The evidence on record indicates that the appellants' witnesses confirmed that the acknowledgment of receipt was signed prior to the disbursement of that loan to DW1. We are of the view that the record from the court below does not show that the loan amount was given to the respondent's representative and that he left the appellant's premises with the money. We form the view that the lower court made findings of fact which were supported by the evidence before it. We are of the opinion that the lower court was on firm ground when it found that the loan amount was not disbursed to the respondent. As such, we do not find merit in the second ground of appeal.

61. The third ground of appeal attacks the lower court for failing to take into consideration that the respondent's deposit of title deeds which created an equitable mortgage also raised a presumption of law that there was consideration, whose rebuttal should have been with the respondent.

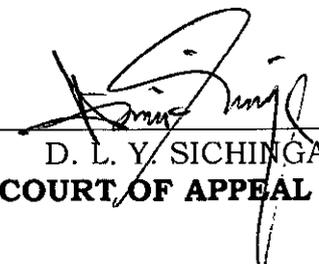
62. It was argued by the appellant that by the surrender of the title deeds, a presumption was created that the respondent owed the appellant. Counsel argued that the respondent should have rebutted the presumption with clear evidence. The respondent's counsel contended that an equitable mortgage cannot be created unless there is consideration and that the mere surrender of a Certificate of Title does not create an equitable mortgage.
63. We have considered the arguments of the parties under ground three. It is our considered view that by the lower court finding that there was no consideration as the respondent did not receive any money from the appellant, it follows that there was no equitable mortgage created and further there was no presumption of the respondent owing the appellant any money as none was disbursed.
64. We have had sight of the letter on page 240 of the record, in which the Board Chair of the respondent wrote to the managing director of the appellant, requesting that the parties conclude the sale transaction of their property number F/411a/D/4/A, which the appellant intended to purchase from the respondent. In the letter, the Board Chair, who happened to be DW1 in the lower court, lamented that only the contract of sale was executed, and that the respondent's representatives gave the Certificate of Title for the

property to the appellant. We are of the view that this confirms that the respondent did not receive any money from the appellant. It therefore follows that no equitable mortgage was created as there was no consideration for the said transaction and no presumption of the respondent owing the appellant could arise.

65. Accordingly, in the view that we have taken, the lower court erred when it found that an equitable mortgage was created as there was no consideration. We reverse the lower court's finding of fact on the issue of an equitable mortgage being created as it was not supported by the evidence on record. We find merit in the third ground of appeal for the aforesaid reasons.

CONCLUSION

66. The net result is that the appeal substantially fails and we accordingly dismiss it. We award costs to the respondent, to be taxed in default of agreement.


D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE


P. C. M. NGULUBE
COURT OF APPEAL JUDGE


A. M. BANDA - BOBO
COURT OF APPEAL JUDGE